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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218260.4 DATE: August 6, 1985

MATTER OF: The Hamilton Tool Company

DIGEST:

Recovery of the costs of filing and pursuing a protest is inappropriate where the remedy afforded the protester is the opportunity to compete under a revised solicitation.

The Hamilton Tool Company requests recovery of the costs, including attorney's fees, of filing and pursuing its protest in The Hamilton Tool Co., B-218260.1, May 17, 1985, 85-1 CPD ¶ 566. In that decision, this Office sustained Hamilton's protest of the Bureau of Engraving and Printing's (BEP) contract award for a United States currency printing press to De La Rue Giori under request for proposals (RFP) No. BEP-83-55(N).

We deny Hamilton's request for recovery of its costs.

In our decision, we found that BEP improperly relaxed its requirements during discussions with the sole offeror in the competitive range without giving all of the original offerors an opportunity to compete on the altered requirements. We held that the agency's action may have prejudiced Hamilton and the other offerors, as their proposed approaches to meeting BEP's actual needs may well have differed from their approaches to meeting the agency's original requirements. We recommended that the contract with De La Rue Giori be terminated and that offers be resolicited under an RFP revised to reflect the agency's actual needs. BEP has adopted our recommendation and has included Hamilton on its mailing list for the revised solicitation.

In its request for reimbursement of costs, Hamilton relies on § 21.6(e) of our Bid Protest Regulations (4 C.F.R. § 21.6(e) (1985)), which provides for the recovery of the reasonable costs of filing and pursuing a protest, including attorney's fees, where the protester has been unreasonably excluded from the procurement, except when this Office recommends that the contract be awarded to

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the protester and the protester receives the award. Since we did not recommend that the contract be awarded to Hamilton, the protester asserts that it is entitled to recover its protest costs in this case.

The agency contends that, under the rule stated in our decision in Federal Properties of R.I., Inc., B-218192.2, May 7, 1985, 85-1 CPD ¶ 508, Hamilton is not entitled to recover the costs of filing and pursuing its protest. In that decision, we sustained the protest because the agency rejected a proposal after applying undisclosed evaluation criteria without giving the offeror an opportunity to prepare an offer with those criteria in mind. In denying the protester's request for recovery of the costs of filing and pursuing its protest, we stated:

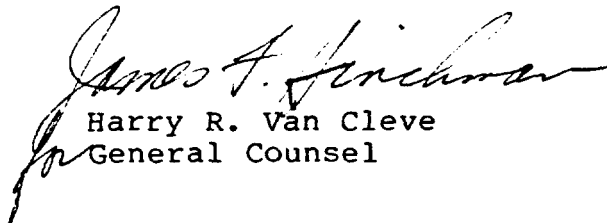
"[W]e believe that where, as here, the procurement problem basically concerns the agency's use of a deficient description of what it wants, and the protester is given an opportunity to compete for the award under a corrected solicitation, the recovery of the costs of filing and pursuing the protest are generally inappropriate."

Hamilton attempts to distinguish our decision in Federal Properties from the instant situation by noting that Federal Properties' protest was filed and decided prior to award so that it was possible to structure relief so that the protester was no longer unreasonably excluded from the procurement. We think Hamilton's reliance on this distinction is misplaced and that the matter of whether the protest was filed before or after award is irrelevant here.

As we indicated in the Federal Properties decision, the thrust of our regulation limiting the recovery of costs to situations where a protester is unreasonably excluded from a procurement is that the recovery of such costs should be allowed only where the protester has been prevented from having the opportunity to compete. Thus, where, as the result of our recommendation, an improperly awarded contract is terminated and the protester is given an opportunity to compete for the award under a corrected solicitation, the protester has not been unreasonably excluded from the procurement and recovery of the costs of filing and pursuing the protest is inappropriate.

Hamilton also argues that awarding it its costs is equitable and would further the policies of the Competition in Contracting Act of 1984 (Pub. L. No. 98-369, 98 Stat. 1175 (1984)) by encouraging potential contractors to expose the procurement irregularities at which the act was directed. Hamilton notes that while it alone bore the cost of pursuing its protest, other offerors and the competitive procurement system also benefited. We think that the policies of the act have been served, as the opportunity for full competition in the instant procurement has been achieved by our decision. Moreover, while other potential competitors and the competitive system may benefit from the decision, Hamilton's protest was filed in its own interest, and that interest has been protected.

The request for the recovery of the costs of filing and pursuing the protest, including attorney's fees, is denied.


Harry R. Van Cleve
General Counsel